

89-1338

Supreme Court, U.S.

FILED

FEB 22 1990

JOSEPH F. SPANIOL, JR.
CLERK

No.

— IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

WESLEY WILLIAM WALTER

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Glenn M. Kottcamp
308 Main St., Suite 2A
Nevada City, CA 95959
(916) 265-3093
Attorney for Petitioner

50 pp



QUESTIONS PRESENTED

Whether a "general order of exclusion" of time based upon "complexity" (ends of justice) (18 USC § 3161(h)(8)(A) and (h)(8)(ii)) continues in effect when the complexity ceases to exist at a later date; and,

Whether a non-contemporaneous statement of reasons justifying exclusion of time required under the Speedy Trial Act must be made within a reasonable period of time after the order of exclusion. (18 USC § 3161 (h)(8)(A)).

PARTIES

Petitioner is the appellant in the Ninth Circuit Court of Appeals case entitled United States of America v Wesley William Walter, 9CCA no 88-1262, in an appeal from the judgment of conviction in United States of America v Wesley William Walter, Eastern District of California (Fresno) no. CR-F 86-89 EDP. The District Court Judge who heard this case was the Honorable Edward Dean Price. Respondent is the United States of America.

Two codefendants were tried together with respondent in the case in the District Court, to wit, Henry Garcia, Jr. and William Wiley Hicks. Mr. Hicks was acquitted.

Mr. Garcia has filed an appeal in the Ninth Circuit, 9CCA no. 88-1188, and is believed to be raising Speedy Trial Act issues in his appeal.

Two other defendants from the original indictment who were convicted have also filed appeals in the Ninth Circuit and are believed to be raising Speedy Trial Act issues, namely Leslie Roy Jordan, 9CCA no. 88-1175 and Ronald Bernard Croft, 9CCA no. 88-1219.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
QUESTIONS PRESENTED	i
PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
APPLICABLE STATUTES	2
STATEMENT OF THE CASE	2
ARGUMENT	5
I. A GENERAL ORDER OF COMPLEXITY SHOULD CEASE TO HAVE EFFECT IF CIRCUMSTANCES CHANGE AND THE CASE IS NO LONGER "COMPLEX"	5
II. THE TIME WITHIN WHICH TO PLACE A STATEMENT OF REASONS ON THE RECORD SHOULD NOT BE UNLIMITED	7
CONCLUSION	10
APPENDIX	
Memorandum Opinion of Ninth Circuit	
Order Denying Petition For Rehearing	
Orders Severing Counts For Trial (3)	
Orders Excluding Time Under Provisions of the Speedy Trial Act	
Memorandum Decision of District Court	
Order Denying Motions	
18 USC § 3161	

TABLE OF AUTHORITIES

CASES

<i>United States v Bryant</i> , 726 F2d 510, 511 (9 Cir 1984)	8
<i>United States v Calabrese</i> , 825 F2d 1342 (9 Cir 1987)	5
<i>United States v Edwards</i> , 627 F2d 460 (DC Cir 1980), cert den 449 US 872	5
<i>United States v Fogarty</i> , 692 F2d 542 (8 Cir 1982)	5
<i>United States v Nance</i> , 666 F2d 353 (9 Cir 1982) cert den 456 US 918	9

STATUTES

18 USC § 3161 (c) (1)	5
18 USC § 3161 (h) (1) (F)	5
18 USC § 3161 (h) (7)	5
18 USC § 3161 (h) (8) (A)	6, 8
18 USC § 3161 (h) (8) (B) (ii)	6, 7

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

WESLEY WILLIAM WALTER

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPINIONS BELOW

The unpublished opinion of the Court of Appeals was filed on November 3, 1989. The order of the Court of Appeals denying rehearing was filed December 22, 1989.

The orders of the District Court severing the case for trial were filed on November 13, 1986. The Memorandum Decision of the District Court concerning the Speedy Trial Act (18 USC §§ 3151-74) was filed on December 2, 1987. (See appendix)

JURISDICTION

The unpublished opinion of the Court of Appeals affirming judgment was filed on November 3, 1989. The order of the Court of Appeals denying hearing was filed December 22, 1989.

This Court has jurisdiction under 28 U.S.C. § 1254 (1) to review the decision of the Court of Appeals.

APPLICABLE STATUTES

TITLE 18 U.S.C. § 3161 (text in appendix).

STATEMENT OF THE CASE

On June 12, 1986 petitioner Wesley William Walter was indicted along with thirty-two other co-defendants alleging violations of federal controlled substance laws and related criminal actions. The indictment contained a total of fifty-six counts; petitioner was charged in counts: 15-19 and 34-37.

The counts were "unrelated to each other except that some of the defendants [were] charged with criminal activity in more than one separate criminal episode, and each of the episodes [was] separate and not related to the others, except that a single defendant has allegedly participated in more than one episode of criminal activity." Appellate Court's Memorandum Opinion on November 3, 1989.

At a status conference hearing on July 14, 1986 the District Court made a "general order" excluding time [under the Speedy Trial Act (18 USC § 3161)] on the basis of "complexity."

At the August 25, 1986 hearing the last defendant was arraigned.

Many defendants filed many motions on September 22, 1986, the date set by the District Court for filing motions.

On November 13, 1986 the District Court filed orders dated

November 12, 1986 denying defendants' motions. The court excluded time in a written order due to motions pending for the period from June 12, 1986 to November 10, 1986.¹

In its November 13, 1986 orders, the court severed the case for three separate trials, all set within seventy days of November 10, 1986 (December 9 and 16, 1986 and January 12, 1987).

In its November 13, 1986 orders the court did not make any reference to the case still being complex under the Act and no time exclusions based upon the complexity were expressly made.

Appellant's trial was set for January 12, 1987 along with two codefendants.

On January 5, 1987 Counts 34 through 37 against appellant were dismissed with prejudice.

Appellant filed a Motion to Dismiss for Violation of the Speedy Trial Act on April 3, 1987. On April 13, 1987 the District Court denied the motion because the motion was not filed on or before the date set by the District Court to file motions. The court did not address the motion on the merits.

On April 20, 1987 petitioner urged the court to reconsider the motion to dismiss as the issue of a violation of the Act is jurisdictional. The Court refused to reconsider the motion stating the motion was statutory and could be heard and considered only if timely filed.

Another defendant's attorney urged the court to reconsider the motions as time under the Act had not run prior to the date to file motions. The court denied the motions stating it found complexity at the onset.

On April 30, 1987 petitioner filed a written Motion to Dismiss and Motion for Reconsideration of the Motion filed April 13. The court again denied the motions on the ground that the motions were not timely filed.

¹Motions were pending for the periods from June 28, 1986 to July 1, 1986 and September 22, 1986 to November 21, 1986. However, all time from the date the indictment was filed to November 21, 1986 was excluded automatically. During this period there were either defendants that had not yet been arraigned or motions were pending.

Petitioner orally renewed the motions to dismiss on November 30, 1987. The court refused to hear the motions as nothing in writing had been filed.

On December 2, 1987 the District Court filed a Memorandum Decision regarding the Speedy Trial Act. The court stated that at the outset the court intended to exclude time under the Act as to all defendants named or counts in the indictment, referring to the July 14, 1986 hearing when the Court stated: "I'm going to make a general order excluding time on the basis of complexity."

The court further states that although it severed out defendants (November 13, 1986 order), it was the court's intention that all defendants, severed or unsevered, were to remain "in the category of unsevered defendants for purposes of computations under the Speedy Trial Act..." except those defendants who were severed and tried.

On December 3, 1987 the District Court again denied petitioner's motion on the ground that it was not timely filed. The court did not deny the motion on the merits. (See appendix)

An eight day jury trial commenced on March 1, 1988. Petitioner was tried on counts 15 through 19. Petitioner was acquitted on count 19 (21 USC § 841 (a) (1) and 18 USC § 2); petitioner was convicted on the remaining counts: Count 15: 21 USC § 963 and § 952 (a); Count 16: 18 USC § 2312 and § 2; Count 17: 21 USC § 952 (a) and 18 USC § 2; Count 18: 18 USC § 1952 and § 2.

Petitioner was sentenced on June 14, 1988 to a prison term of eighteen months followed by a five-year period of probation after his release from custody. Additionally, a special parole term of two years was imposed.

Petitioner appealed to the Ninth Circuit Court of Appeals, contesting, inter alia, the denial of his motions to dismiss for violation of the Speedy Trial Act.

On November 3, 1989 the Court of Appeals affirmed judgment. Petitioner's Petition for Rehearing was denied on December 22, 1989.

ARGUMENT

I

THE GENERAL ORDER OF COMPLEXITY SHOULD CEASE TO HAVE EFFECT IF CIRCUMSTANCES CHANGE AND THE CASE IS NO LONGER COMPLEX

The Speedy Trial Act ("Act") sets time limits within which a defendant must be brought to trial. The Act requires that a defendant be brought to trial "within seventy days from the filing date... of the... indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 USC § 3161 (c) (1).

There is but one Speedy Trial Act clock in a case involving multiple unsevered defendants. Exclusions for one defendant apply to all unsevered defendants. 18 USC § 3161 (h) (7); *United States v Fogarty*, 692 f2d 542 (8 Cir 1982); *United States v Edwards*, 627 F2d 460 (DC Cir 1980), cert den 449 US 872.

Conversely, if defendants are severed, time calculations under the Act should be made independently, of *United States v Calabrese*, 825 F2d 1342 (9 Cir 1987).

Thus time was automatically excluded as to all defendants in this case until the last defendant was arraigned on August 25, 1986.

Time is also excluded automatically when motions are pending before the District Court. Motions were filed by many defendants on September 22, 1986, the date set by the court.

The last of these motions was decided on November 21, 1986. Thus, time was excluded automatically for the period from September 22, 1986 to November 21, 1986.²

² Although the court only excluded time to November 10, 1986 due to motions pending in its orders filed November 13, 1986, the last motion was decided on November 21, 1986. See Court's Memorandum Decision filed December 2, 1987. Time is excluded automatically when motions are pending. 18 USC §§ 3161 (h) (1) (F).

In addition to the automatic time exclusions discussed above, time may be excluded by the District court under certain circumstances. Included in discretionary time exclusions is the "ends of justice" exclusion (18 USC 3161 § (h) (8) (A)).

Factors to be considered by the court in determining if an "ends to justice" exclusion should be made is set forth in 18 USC § 3161 (h) (8) (B) (ii):

Whether the case is so unusual or so complex due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pre-trial proceedings or for trial itself within the time limits established by this section.

Petitioner concedes this case was complex at the outset. There were thirty-two defendants in a fifty-six count indictment with some 30,000 pages of discovery.³

On July 14, 1986 the court made its "general order excluding time [under the Speedy Trial Act] on the basis of complexity." The court again excluded time on the basis of complexity at the hearing on August 25, 1986.

As of November 21, 1986 all motions (except the motions for violations of the Act) had been filed and decided by the court. Discovery had been completed and the court severed defendants into three groups for separate trials, setting all three trial dates within seventy days of November 10, 1986 (December 9 and 16, 1986 and January 12, 1987). Petitioner's trial was set for January 13, 1987.⁴ The District Court made no specific findings of complexity on or after November 10, 1986.

³ This case should never have been complex; it was complex only because of the manner in which it was filed. This case was actually a series of unrelated incidents as indicated by the court and the prosecutor filing the case.

⁴ Petitioner's name was inadvertently omitted from the order of November 13, 1986. This was corrected by an amended order of February 20, 1987.

Considering the factors set forth in 18 USC § (h) (8) (B) (ii), the case was no longer complex after November 10, 1986. Severance reduced the number of defendants in petitioner's case to three. The nature of the case involving the five remaining counts was not exceptional. All five counts arose from a single episode of activity. There were no novel questions of law or fact and all pre-trial hearings and trial preparation had been completed, except the motions under the Speedy Trial Act.

Accordingly, the time within which to commence trial under the Act began to run on November 21, 1986. The seventy day period ran on January 30, 1987 without commencement of trial.

Continued application of the court's general order of exclusion based upon "complexity" cannot be justified under the Act after November 21, 1986 when the case was no longer complex.

Even the court's Memorandum Decision of December 2, 1987 does not articulate factors justifying a finding of complexity after November 10, 1986. The court does explain the factors present in July and August 1986, i.e., number of defendants, number of counts and amount of discovery, however, these factors no longer existed after November 10, 1986.

To permit a finding of complexity and exclusion of time under the Act to continue after the case is no longer complex frustrates the very purpose of the Speedy Trial Act.

The inherent danger of such a general order of exclusion without renewed scrutiny was realized in this case and denied petitioner his right to a trial within the time limits prescribed in the Act.

II

THE TIME WITHIN WHICH TO PLACE A STATEMENT OF REASONS ON THE RECORD SHOULD NOT BE UNLIMITED

On December 2, 1987, approximately one year and two weeks after the case ceased to be complex and approximately one year and three months after the last finding of complexity, the court filed a Memorandum Decision discussing its complexity exclusion

under the Act.

The court stated that in its general order of exclusion [July 14, 1986] it "announced its intention to file a general order excluding all time until the commencement of the final trial of any of the defendants named or any of the counts charged in the indictment."

The transcript of the hearing of July 14, 1986 does contain the reference to the general order (quoted supra). However, the transcript does not indicate any statement was made of intent to exclude time until all defendants and counts have been tried.

The court then stated that it "considered all of the defendants, except those who were severed and tried, to be in the category of unsevered defendants for purposes of computations under the Speedy Trial Act." This information had not been previously communicated to the defendants.

The court's unexpressed intent to sever defendants without severance for the purposes of time computations under the Act is not a proper ground for exclusion of time.

The court's reasoning that the case was complex was due to the number of defendants, number of counts and the amount of discovery was applicable only to November 21, 1986. As discussed in Argument I, supra, the factors supporting a finding of complexity were no longer present after that date.

When the court made its general order of exclusion of July 14, 1986 and again on August 25, 1986 the court did not make a statement on the record of reasons justifying the "complexity - ends of justice" exclusion as mandated by the Act (18 USC § 3161 (h) (8) (A)).

These reasons must be put in the record, orally or in writing, but need not be contemporaneous with the order so long as the court later shows the delay was motivated by proper considerations.

United States v Bryant, 726 F2d 510, 511 (9 Cir 1984).

Petitioner submits that the statement of reasons must be made within a reasonable time after the order and, at a minimum, that this be done before the expiration of the seventy day period within which to commence trial.

It is submitted that one year and three months after the order is not reasonable. There must be some standard limiting the time within which the Court must comply with its duty under the Act.

Requiring a statement before expiration of time within which to commence trial would not unduly burden the court. Further, it would seem that the effect of an order excluding time under the complexity would not have effect until the statement of reasons is placed on the record. If so, then the order without the statement would not toll the running of time under the Act. After seventy days dismissal would be required.

A timely, though not necessarily contemporaneous statement, provides notice to all parties of the reasons for the court's actions and insures that the court's reasons related to the circumstances as they existed at the time of the exclusion order and that no significant changes in the case have occurred affecting the complexity issue.

This case evidences the pitfalls of an unreasonable delay in providing the statement of reasons for exclusion of time based upon an "ends of justice" order.

Approximately one year and three months after finding "complexity" the court makes a statement of reasons for its orders of July 14, 1986 and August 25, 1986. Those reasons ceased to have validity after November 21, 1986.

The court discusses its congested calendar and the fact that it could not have tried the defendants in this case even if it had been more properly filed as several cases. A congested calendar, however, is not proper basis for exclusion of time under the Act. *United States v Nance*, 666 F2d 353 (9 Cir 1982) cert den 456 US 918.

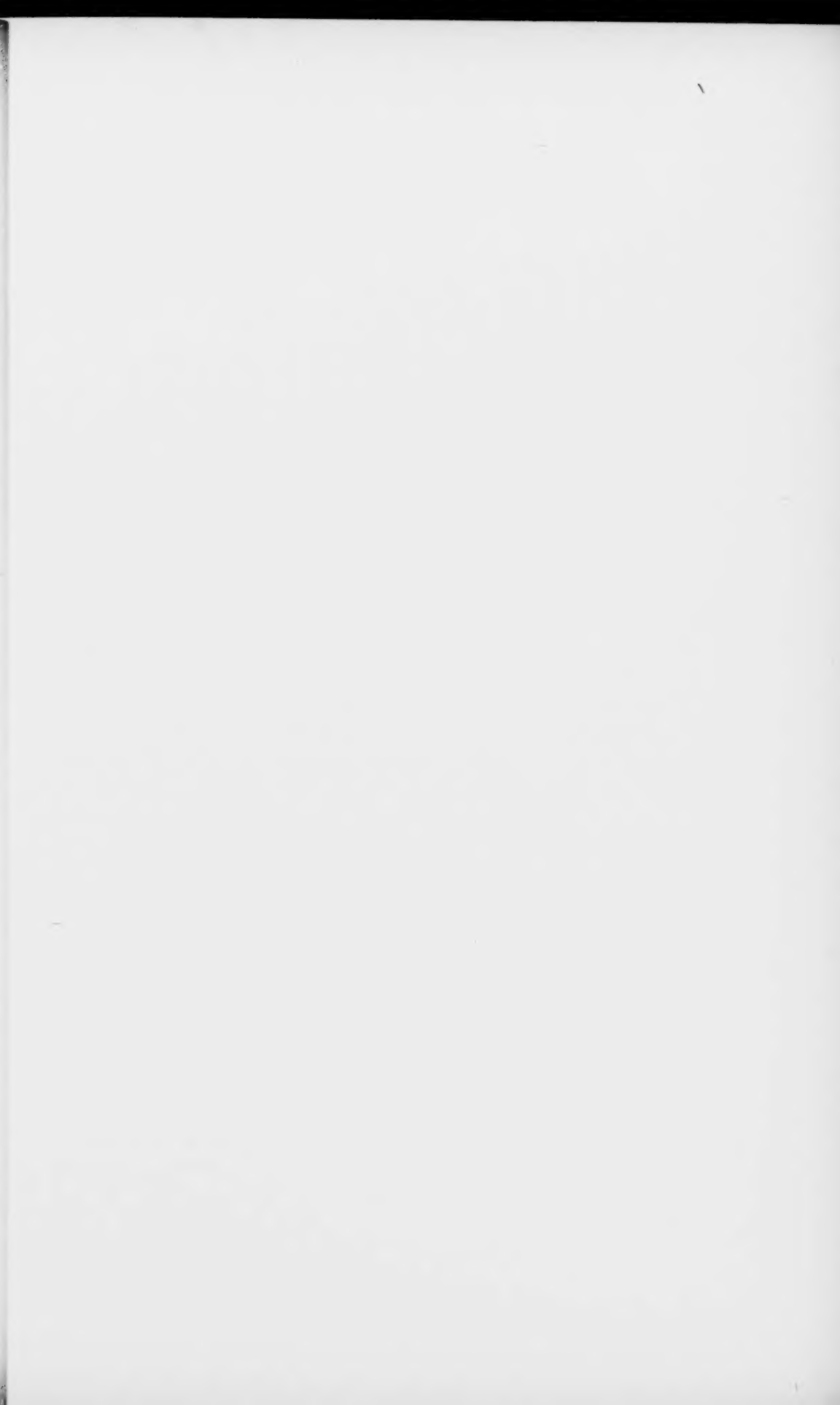
The failure to make a timely statement of reasons justifying the order excluding time resulted in violation of the Speedy Trial Act.

CONCLUSION

Petitioner respectfully urges the court to grant a writ of certiorari and rule that a general order of exclusion of time under the "ends of justice" continuance ceases to have legal effect when the case thereafter ceases to be complex under the Speedy Trial Act; and, that the statement of reasons justifying exclusion of time under the "ends of justice" exclusion needs to be made on the record within a reasonable time after the order of exclusion. It is suggested that, at a minimum, the statement of reasons must be made within the time period to commence trial.

Respectfully submitted

GLENN M. KOTTCAMP
Attorney for Petitioner





FILED

NOV 3, 1989

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRUIT

UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellee,	)	No. 88-1262
)	
v.	)	D.C. No. CR 86-0089-EDP
)	
WESLEY WILLIAM WALTER	)	MEMORANDUM*
)	
Defendant-Appellant.)	

Appeal from the United States District Court
for the Eastern District of California
Edward D. Price, District Judge, Presiding

Argued and Submitted May 12, 1989
San Francisco, California
Filed November 3, 1989

Before: BROWNING, HALL, and LEAVY, Circuit Judges.

Wesley William Walter appeals his conviction following a jury trial for conspiracy to import a controlled substance in violation of 21 U.S.C. §§ 963 and 952(a), transportation of stolen aircraft in foreign commerce in violation of 18 U.S.C. §§ 2312 and 2, importation of a controlled substance in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 2, and travel in foreign commerce with intent to promote unlawful activity in violation of 18 U.S.C. § 1952. Walter contends his conviction should be reversed for alleged violation of the Speedy Trial Act, 18 U.S.C. §§

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

3161-74 (1982 & Supp. IV 1986), and for an allegedly erroneous evidentiary ruling. In addition, Walter appeals the district court's denial of his request that sanctions be imposed upon the government for an alleged Jencks Act violation. We affirm.

I. Speedy Trial Act

The Speedy Trial Act, 18 U.S.C. § 3161-74, provides that a defendant shall be brought to trial within seventy days after indictment or arraignment, whichever occurs later. *Id.* at § 3161(c)(1). The Act allows the district court to grant a continuance on the request of either side or on its own motion and exclude the resulting delay from the seventy day computation if the court (1) finds "that the ends of justice served by the granting of such continuance outweigh the best interest of the public and the defendant in a speedy trial," and (2) sets forth its reasons for that finding on the record. *Id.* at § 3161(h)(8)(A). The court may grant an "ends of justice" continuance if the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of law or fact, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section. *Id.* at § 3161(h)(8)(B)(ii).

On June 12, 1986, Walter and thirty-two codefendants were charged with a total of fifty-six counts relating to federal narcotics violations. During status conferences in July and August of 1986, the court stated that it would exclude time under the Speedy Trial Act because of the complexity of the case. No specific periods of time were mentioned. Neither party objected. On November 12, 1986, the court decided pending motions and severed certain counts and defendants, setting dates for three separate trials. Simultaneously, the court filed a notice excluding time from June 12, 1986, to and including November 10, 1986, under the Speedy Trial Act based upon motions pending during that period.

In February of 1987 the court set an April trial date for Walter on certain remaining counts of the indictment. Walter filed a motion to dismiss for violation of the Speedy Trial Act, contending that time began to run under the Act on November 11 because the case was no longer complex after the November 12 order of partial severance. The court denied the motion to dismiss on the ground that it was untimely. On reconsideration, the court filed on December 2, 1987, a memorandum decision denying the motion to dismiss, stated that at the July and August status conferences "[t]he Court announced its intention to file a general order excluding all time until the commencement of the final trial of any of the defendants named or in any of the counts charged in the indictment."

We review for clear error the trial court's factual finding of complexity under section 3161(h)(8)(A). United States v. Frey, 735 F.2d

350, 352 (9th Cir. 1984). Factual findings must be "set forth with particularity." United States v. Perez-Reveles, 715 F.2d 1348, 1352 (9th Cir. 1983) (quoting H.R. Rep. No. 1508, 93rd Cong., 2d Sess.), reprinted in 1974 U.S. Code Cong. & Ad. News 7401, 7426. "The 'ends of justice' exclusion was not . . . meant to be a general exclusion for every delay no matter what its source, but was to be based on specific underlying factual circumstances." United States v. Pollock, 726 F.2d 1456, 1461 (9th Cir. 1984).¹

In its memorandum of decision, the district court stated that the indictment charged thirty-three codefendants with fifty-six counts relating to federal narcotics violations. The counts are unrelated to each other except that some of the defendants are charged with criminal activity in more than one separate criminal episode, and each of the episodes is separate and not related to the others, except that a single defendant has allegedly participated in more than one episode of criminal activity. Each separate episode of criminal activity gives rise to several counts in the indictment. The district court also stated that seven defendants and a total of thirty-five counts remained to be tried at the time of Walter's trial. Under the circumstances described, we cannot find clearly erroneous the trial court's conclusion that the case was complex under section 3161(h)(8)(B)(ii). See United States v. Bryant, 726 F.2d 510, 511-12 (9th Cir. 1984) (complexity under Act when 135 motions had been filed that may have affected each defendant and the case involved twenty-four defendants). Cf. Perez-Reveles, 715 F.2d at 1352-53 & n.5 (record insufficient to support complexity when a single defendant, charged with a common narcotics violation, and case took only two days to try).

Walter also contends that the court's December 1987 memorandum of decision does not satisfy the section 3161(h)(8)(A) requirement of a record of findings because it was a nunc pro tunc finding entered after the seventy day period of the Act had run. However, a court granting an "ends of justice" continuance is not required to contemporaneously set down the factual predicate for its determination. Bryant, 726 F.2d at 511. Simultaneous findings are unnecessary so long

¹ In Pollock we stated that the "ends of justice" exclusion under 3161(b) is proper only if ordered for a specific period of time. Id. We do not believe the language in Pollock applies to this case. Pollock concerned the issue of whether overlapping continuances granted by two different judges should be construed as excluding the total number of days involved in each continuance, rather than as excluding the total period of time covered by the dates specified in the two concurrences. The rationale of Pollock was that exclusions of time must relate to a specific factual situation. Id. That concern is not at issue here, as the district court's memorandum of decision specifically discussed the complexity of the case at the time it set Walter's trial.

as the trial court later shows that the delay was motivated by proper consideration. Id. Here, the trial judge made explicit references to complexity as the basis for exclusion of time under the Act at the July and August status conferences. Compare Perez-Reveles, 715 F.2d at 1352 (in response to request for continuance, judge merely stated, "[v]ery well then"). The statements were made prospectively, well within the seventy day period of the Act. Compare id. (in denying motion to dismiss under the Act, judge made retroactive exclusion of time under the Act). We conclude that under these circumstances, the court satisfied the requirement of section 3161(h)(8)(A).

II. Sanctions for Alleged Jencks Act Violation

We review denial of a motion for sanctions for violation of the Jencks Act for abuse of discretion. United States v. Moody, 778 F.2d 1380, 1383 (9th Cir. 1985).

Walter moved during trial to have the government sanctioned due to the failure of Agent Sherrington to record or otherwise memorialize certain pre-trial conversations between himself and a government witness. Such materials, if in proper form, would have been discoverable under 18 U.S.C. § 3500 (the Jencks Act). However, in United States v. Bernard, 625 F.2d 854 (9th Cir. 1980), we stated that there is "no statutory basis for compelling the creation of Jencks Act material The purpose of the Act was to make any existing prior statements made by a government witness equally available to the defense and the prosecution." Id. at 859 (emphasis in original) (citation omitted). Accordingly, the district court did not abuse its discretion in failing to impose sanctions.

III. Admission of Telephone Records

We review a court's decision to admit evidence for abuse of discretion. United States v. Cox, 633 F.2d 871, 874 (9th Cir. 1980), cert. denied, 454 U.S. 844 (1981).

During the course of trial, the prosecution introduced into evidence copies from microfilm of records of Walter's long distance telephone calls to his alleged coconspirators during the time period alleged in the indictment. Unindicted coconspirator Harris testified that the importation scheme was frequently discussed with the defendant over the telephone. Evidence was presented establishing that the telephone records at issue were for the telephone subscribed to by Walter and located at his residence. The records reflected calls from Walter's residence to telephones connected to his coconspirators. The evidence of contact and association tends to prove circumstantially the agreement that is an element of the conspiracy charged and is therefore relevant. See United States v. Disla, 805 F.2d 1340, 1352 (9th Cir. 1986) (calls from floor of jail where defendant was being held to homes of coconspirators was circumstantial evidence of conspiracy). Direct proof of the identity of a

caller need not be presented for a court to find that an adequate foundation for the admission of telephone records has been established. United States v. Bonilla, 615 F.2d 1262, 1264-65 (9th Cir. 1980).

The form of the telephone records did not violate the best evidence rule. Federal Rule of Evidence 1003 provides that a duplicate may be used in lieu of an original unless a genuine question is raised as to the authenticity of the original. According to the Advisory Committee's Note regarding Federal Rule of Evidence 1001, prints from microfilm records are admissible as duplicates under the best evidence rule.

AFFIRMED.

FILED

DEC 22, 1989

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRUIT

UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellee,	)	No. 88-1262
)	
v.	)	D.C. No. CR 86-0089-EDP
)	
WESLEY WILLIAM WALTER	)	ORDER
)	
Defendant-Appellant.)	

Before: BROWNING, HALL, and LEAVY, Circuit Judges.

The petition for rehearing is denied.

FILED

Nov 13 8:55 AM '86

CLERK, U.S. DIST. COURT

EASTERN DIST. OF CALIF.

AT FRESNO

BY

DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

RONALD BERNARD CROFT and
GLENN NOLAND RICHARDS, et al.,

Defendants

CR F-86-89 EDP

ORDER SEVERING

COUNTS

AND FOR TRIAL

The Court orders Counts Twenty-nine (29), thirty (30), thirty-one (31), thirty-two (32), thirty-eight (38), thirty-nine (39), forty (40) and forty-one (41) severed for trial.

The Court orders the matter on calendar for Trial Confirmation and final Pre-Trial Conference on Monday, December 1, 1986 at 2:00 p.m.

The Court orders the matter for Trial on Tuesday, December 9, 1986 at 10:00 a.m.; trial to be by jury.

DATED: November 12, 1986.

EDWARD DEAN PRICE
United States District Judge

FILED

Nov 13 8:55 AM '86
CLERK, U.S. DIST. COURT
EASTERN DIST. OF CALIF.
AT FRESNO

BY _____
DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,	)	CR F-86-89-EDP
)	
v.)	
	)	ORDER FOR
HENRY GARCIA, JR., WILLIAM	)	SEVERANCE AND
WILEY HICKS, MIGUEZ ANGEL	)	<u>FOR TRIAL</u>
LOPEZ BATIZ, ROBERT EDWIN)	
PIPER, JAMES GUTIERREZ, THOMAS)	
URSUA, JR., and DONALD SCOTT)	
SILKS, et al.,)	
)	
Defendants.)	
_____)	

The Court orders Counts two (2), three (3), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), and fourteen (14), severed for trial.

The Court orders the matter on calendar for final Pre-Trial Conference on Monday, December 8, 1986 at 2:00 p.m.

The Court orders the matter for Trial on Tuesday, December 16, 1986 at 10:00 a.m.; trial to be by jury.

DATED: November 12, 1986.

EDWARD DEAN PRICE
United States District Judge

FILED

Nov 13 8:55 AM '86

CLERK, U.S. DIST. COURT

EASTERN DIST. OF CALIF.

AT FRESNO

BY

DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

CR F-86-89 EDP

ORDER SEVERING
COUNTS

RICHARD CARVEL WACHTER,)

WESLEY WILLIAM WALTER,)

ARMANDO PEREZ, and WAYNE)

LESLIE DUARTE, et al.,)

Defendants.)

The Court orders Counts thirty-four (34), thirty-five (35),
thirty-six (36), and thirty-seven (37) severed for trial.

The Court sets the matter for Pre-Trial Conference/Trial
Confirmation on Monday, January 5, 1987 at 2:00 p.m.

The Court sets the matter for Trial on Tuesday, January 13,
1987 at 10:00 a.m.

DATED: November 12, 1986.

EDWARD DEAN PRICE
United States District Judge

FILED

Nov 13 8:55 AM '86

CLERK, U.S. DIST. COURT

EASTERN DIST. OF CALIF.

AT FRESNO

BY

DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

V.

RICHARD ANDREW SIMPSON, et al.,

Defendants.

CR F-86-89 EDP

ORDER EXCLUDING

TIME UNDER

PROVISIONS OF THE

SPEEDY TRIAL ACT

The Court excludes the period from June 12, 1986 to and including November 10, 1986, or a total of 151 days, from all computations pursuant to the Speedy Trial Act. This exclusion is required by virtue of the fact that motions were pending during that period.

DATED: November 12, 1986.

EDWARD DEAN PRICE
United States District Judge

FILED

Dec 2 10:57 AM '87
CLERK, U.S. DIST. COURT
EASTERN DIST. OF CALIF.
AT FRESNO

BY

DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD ANDREW SIMPSON,
RONALD BERNARD CROFT, and
LESLIE ROY JORDAN, et al.,

Defendants.

CR F-86-89 EDP

MEMORANDUM
DECISION

On June 12, 1986, the United States Attorney's Office - Fresno, filed an indictment charging twenty-nine (29) individual defendants with fifty-six (56) separate criminal counts. The counts are unrelated to each other except in two (2) respects:

1. Some of the defendants are charged with criminal activity in more than one separate criminal episode.¹
2. Each of these episodes are separate and are not related to each other, except that a single defendant has allegedly participated in more than one episode of criminal activity. The Court chooses the word "episode" because each separate episode of criminal activity gives rise to several counts in the indictment.

In order to provide discovery to the defendants, the government deposited the discovery material, consisting of in excess of thirty thousand (30,000) separate documents with a copying facility in Fresno and allowed each defendant, and/or his counsel, to order such discovery as they

¹All of the criminal episodes have a common theme, i.e., the importation of a controlled substance into the United States from a foreign country.

desired. The Court is not sure when the parties were finally through with the discovery process, however, the attendant appendix shows when the first motions were filed. Presumably, the moving parties in such motions had sufficient discovery to feel comfortable in filing the motion.

At the outset of the case, the Court stated that it obviously could not handle all of the defendants named and all of the counts charged within the purview of the Speedy Trial Act. The Court announced its intention to file a general order excluding all time until the commencement of the final trial of any of the defendants named or any of the counts charged in the indictment. There was no objection to this announcement at the time it was made.²

Second, the Court announced that it would sever out certain defendants and certain counts for trial as the defendants appeared ready. The Court did this, trying certain of the defendants during the time specified in the appendix attached to this Memorandum Decision. The Court considered all of the defendants, except those who were severed and tried, to be in the category of unsevered defendants for purposes of computation under the Speedy Trial Act. Some of the defendants who actually went to trial were named in other counts and as such, in the Court's view, were considered unsevered defendants for purposes of the Speedy Trial Act.

From a reading of the indictment which was filed, it is obvious that had the Court started on the thirty-first (31) day after the indictment was returned, it could not have tried all of the defendants named in the indictment in the time allotted by the Speedy Trial Act, including additions occasioned by applying the exemptions contained in the statute. The same fact is true even if the Court had started the trials immediately after the decision of the last motion.

Presently, the above-named defendants are on trial for the charges contained in counts twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27) and twenty-eight (28) of the instant indictment. However, after this trial is completed, the following defendants and counts remain to be tried:

1. Ronald Croft - counts four (4), twenty-nine (29), thirty (30), thirty-one (31), and thirty-two (32).

²The Assistant United States Attorney who originally filed the action is no longer in the United States Attorney's Office and the present Assistant United States Attorney who is handling these trials was not present at the time the Court made that announcement. Likewise, the attorney representing the defendant Simpson, who was present when that announcement was made, is no longer in the case; the defendant Simpson having substituted new counsel. The district Speedy Trial Plan requires objections to such exclusions to be filed within ten (10) days.

2. Henry Garcia - counts fifteen (15), sixteen (16), seventeen (17), eighteen (18), and nineteen (19).

3. William Hicks - counts fifteen (15), sixteen (16), seventeen (17), eighteen (18), and nineteen (19).

4. Leslie Jordon - counts four (4), and six (6).

5. Janice Simpson - counts fifty-three (53), fifty-four (54), and fifty-five (55).

6. Richard Simpson - counts one (1), twenty-four (24), forty-two (42), forty-three (43), forty-four (44), forty-five (45), fifty-three (53), fifty-four (54), fifty-five (55) and fifty six (56).

7. Wesley Walter - counts fifteen (15), sixteen (16), seventeen (17), eighteen (18) and nineteen (19).

The following defendants and the counts with which they are charged are presently fugitives. Presumably, arrest warrants are outstanding against each of them.

1. Miguel Angel Lopez Batiz - counts five (5), seven (7), eight (8), nine (9) and ten (10).

2. Hugo Chavez Gastellum - counts fifty-three (53), fifty-four (54), and fifty-five (55).

3. Angel Olivera - counts fifteen (15), sixteen (16), seventeen (17), eighteen (18), nineteen (19), forty-six (46), forty-seven (47) and forty eight (48).

4. Refugio Salazar - counts twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), forty-two (42), forty-three (43), forty-four (44).

5. Glenn Richards - counts twenty -seven (27), thirty (30), thirty-one (31), thirty-eight (38), thirty-nine (39), forty (40), forty-one (41).

Absent some unseen fortuitous circumstance, even had the original indictment been broken into individual indictments, both judges in the court could not have complied with the Speedy Trial Act.

The Court has previously spent twenty (27) trial days trying cases in this indictment and has the preceeding list of counts and defendants to try.

The Court's powers over an indictment are very narrow and limited. The Court cannot amend an indictment nor present the charge to the jury in such a way that constitutes a constructive amendment to the indictment. Thus, faced with the indictment in its present form, the Court had no alternative but to proceed with the indictment.

Accordingly, on July 14, 1986, at the Status Conference in the matter, the Court stated: "All right, I'm going to make a general order excluding time on the basis of complexity."

The formal order will be filed with this memorandum decision.

DATED: December 1, 1987

EDWARD DEAN PRICE
United States District Judge

APPENDIX
TRIALS & MOTIONS IN CRF-86-89-EDP

I. <u>Trials</u>	<u>Begin</u>	<u>End</u>
Defendants Garcia and Silks	01/14/87	01/16/87
Defendants Garcia and Tufono (in re- lated case CRF-86- 147-EDP)	02/18/87	02/24/87
Defendants Barnes, Garcia, Ragsdale, Santana, Silks, Telles, and Ybara	07/14/87	08/13/87
Defendants Croft, Jordan, and Simpson	11/12/87	

II. <u>Motions</u>	<u>Filed</u>	<u>Submitted</u>	<u>Decided</u>
--------------------	--------------	------------------	----------------

United States v. Barnes, Robert

Motions for Dis- covery, Severance. Disclosure of Informants, Bill of Particulars	09/22/86	11/10/86	11/13/86
Government's Motion for Severance	11/12/86		11/13/86
Defense Motions	03/31/87		04/20/87

(Trial commencing 07/14/87 and ending 08/12/87)

<u>Motions</u>	<u>Filed</u>	<u>Submitted</u>	<u>Decided</u>
Motion to Dismiss	07/17/87		07/21/87
Motion to Dismiss	08/05/87		08/06/87

United States v. Cook, Phillip

Motions for Discovery, Severance, Disclosure of Informants, Bill of Particulars	09/22/86	11/10/86	11/13/86
Government's Motion for Severance	11/12/86		11/13/86

United States v. Croft, Ronald

Motions for Discovery, Severance, Disclosure of Informants, Bill of Particulars	09/22/86	11/10/86	11/13/86
Government's Motion for Severance	11/12/86		11/13/86
Motion to Dismiss	11/09/87		11/12/87

(Trial commencing 11/12/87)

United States v. Duarte, Wayne

Motions for Discovery & Severance	09/22/86	11/10/86	11/13/86
-----------------------------------	----------	----------	----------

<u>Motions</u>	<u>Filed</u>	<u>Submitted</u>	<u>Decided</u>
Motion for Disclosure of Informants	09/24/86		11/13/86
Government's Motion for Severance	11/12/86		11/13/86
Motion for Continuance	12/22/86	---	---

United States v. Garcia, Henry, Jr.

Motion for Discovery	09/23/86	11/10/86	11/13/86
Government's Motion for Severance	11/12/86		11/13/86
Appeal	11/13/86		03/15/87
Motions to Continue & Withdraw as Counsel	01/06/87		01/08/87

(Trial commencing 01/14/87 and ending 01/16/87)

Motion for Acquittal & New Trial	01/21/87	06/25/87	07/02/87
Motion to Substitute Counsel	02/17/87		04/13/87

(Trial commencing 02/18/87 and ending 02/24/87)

Request for Bail Review	04/27/87	04/29/87	08/31/87
-------------------------	----------	----------	----------

<u>Motion</u>	<u>Filed</u>	<u>Submitted</u>	<u>Decided</u>
Joinder in Motion to Suppress	07/06/87	06/29/87	11/04/87
Motion to Dismiss	07/17/87		07/21/87
(Trial commencing 07/14/87 and ending 08/13/87)			
Motions for Mistrial & to Disqualify	07/20/87		07/22/87
Motions for Sanctions for Prosecutorial Misconduct	08/05/87		08/06/87

United States v. Gutierrez, James

Motions for Discovery, Severance, Disclosure of Informants, Bill of Particulars	09/22/86	11/10/86	11/13/86
Government's Motion for Severance	11/12/86		11/13/86
Motion to Dismiss	03/30/87		03/31/87

United States v. Hicks, William

Motion for Discovery	09/23/86	11/12/86	11/13/86
Motion for New Counsel, Joinder in Motion to Dismiss	04/03/87		04/14/87

Joinder in Motion for Reconsideration; Motion for Severance	05/01/87		05/04/87
--	----------	--	----------

United States v. Jordan, Leslie

Motions for Discovery & Severance, Bill of Particulars	09/22/86	11/10/86	11/13/86
---	----------	----------	----------

Government's Motion for Severance	11/12/86		11/13/86
---	----------	--	----------

Motion to Dismiss	11/09/87		11/12/87
-------------------	----------	--	----------

(Trial commencing	11/12/87)		
-------------------	-----------	--	--

United States v. McLeman, David

Motions for Dis- covery, Severance, Disclosure of Infor- mants, Bill of Particulars	09/22/86	11/10/86	11/13/86
---	----------	----------	----------

Government's Motion for Severance	11/12/86		11/13/86
---	----------	--	----------

Defense Motions	03/31/87		04/20/87
-----------------	----------	--	----------

United States v. Medina, Ruben

Motions for Dis- covery, Severance, Disclosure of Infor- mants, Bill of Particulars	09/22/86	11/10/86	11/13/86
---	----------	----------	----------

Government's Motion for Severance	11/12/86		11/13/86
Defense Motions	03/31/87		04/20/87
Motion to Dismiss	04/03/87		04/14/87
Motions to Dismiss, for Reconsideration	04/30/87		05/04/87

United States v. Perez, Armando

Motions for Dis- covery, Severance, Disclosure of Infor- mants, Bill of Particulars	09/22/86	11/10/86	11/13/86
Government's Severance	11/12/86		11/13/86

United States v. Piper, Robert

Motions for Dis- covery, Severance, Disclosure of Infor- mants, Bill of Particulars	09/22/86	11/10/86	11/13/86
Government's Severance	11/12/86		11/13/86
Motion to Dis- qualify EDP	02/02/87(REC)	02/24/87	02/25/87
Motion to Modify Sentence	07/17/87	08/31/87	---

United States v. Ragsdale, Robert

Motions for Discovery, Disclosure of Informants, Bill of Particulars	09/22/86	11/10/86	11/13/86
--	----------	----------	----------

Government's Severance	11/12/86		11/13/86
------------------------	----------	--	----------

Defense Motions	03/31/87		04/20/87
-----------------	----------	--	----------

(Trial commencing 07/14/87 and ending 08/13/87)

Joinder in Motions for Mistrial	07/22/87		07/21/87
---------------------------------	----------	--	----------

Motion to Dismiss	08/05/87		08/06/87
-------------------	----------	--	----------

Acquittal, New Trial	08/20/87	09/22/87	11/04/87
----------------------	----------	----------	----------

United States v. Santana, Alfred

Motions for Discovery, Severance, Disclosure of Informants, Bill of Particulars	09/22/86	11/10/86	11/13/86
---	----------	----------	----------

Government's Severance	11/12/86		11/13/86
------------------------	----------	--	----------

Joinder in Defense Motions	04/15/87		04/20/87
----------------------------	----------	--	----------

(Trial commencing 07/15/87 and ending 08/13/87)

Motion to Dismiss	07/17/87		07/21/87
-------------------	----------	--	----------

Motion to Dismiss	08/05/87		08/06/87
-------------------	----------	--	----------

Motions for Acquittal, New Trial	08/20/87	09/22/87	11/04/87
----------------------------------	----------	----------	----------

United States v. Scheinhost, Stewart

Motions for Discovery, Severance, Disclosure of Informants, Bill of Particulars	09/22/86	11/10/86	11/13/86
Government's Severance	11/12/86		11/13/86

United States v. Silks, Donald

Motion for Bail Review	06/27/86		07/01/86
Motion for Discovery	09/25/86	11/10/86	11/13/86

(Trial commencing 01/13/87 and ending 01/16/87)

Motions for New Trial & Acquittal	01/26/87	06/25/87	07/02/87
Motions for Discovery & Severance, to Suppress	04/02/87		04/21/87
Motion to Suppress	06/30/87		07/06/87

(Trial commencing 07/14/87 and ending 08/12/87)

United States v. Simpson, Janice

Motions for Discovery, Severance, & Disclosure of Informants; Bill of Particulars	09/22/86	11/12/86	11/13/86
Motion to Modify Restraining Order	02/09/87(EDP) 03/03/87(REC)	03/09/87	03/02/87 04/14/87

Motion to Modify Bail Conditions	03/23/87		04/06/87
Motion for Disclosure of Impeaching Information	03/31/87		04/20/87
Motion to Suppress	04/28/87	06/29/87	07/23/87
Motion for Reconsideration	08/05/87		08/25/87

United States v. Simpson, Richard

Government's Severance	11/10/86		11/13/86
Motions for Dis- covery, & Severance, Bill of Particulars	01/12/87	(dropped on 02/19/87)	
Motion to Modify Restraining Order	02/09/87(EDP) 03/02/87(REC)	03/09/87	03/02/87 04/14/87
Motions for Evid. Hearing, to Dismiss	03/23/87	04/20/87	- - -
Motion to Suppress	03/31/87	06/29/87	11/04/87
Motion to Dismiss	11/09/87		11/12/87

(Trial commencing 11/12/87)

United States v. Telles, Carlos

Joinder in Motions for Discovery, Disclosure of Infor- mants, Production, Bill of Particulars	10/16/86	11/10/86	11/13/86
---	----------	----------	----------

Government's Severance	11/12/86		11/13/86
---------------------------	----------	--	----------

Motions to Dis- miss, Joinder in Motion for Dis- closure of Im- peaching Infor- mation, Joinder in Severance.	04/06/87		04/20/87
---	----------	--	----------

Motion for Stay	05/07/87		05/08/87
-----------------	----------	--	----------

(Trial commencing 07/14/87 and ending 08/13/87)

Motion to Dismiss	07/17/87		07/21/87
-------------------	----------	--	----------

Motion to Dismiss	08/05/87		08/06/87
-------------------	----------	--	----------

Motions for Ac- quittal, New Trial	08/20/87	09/22/87	11/04/87
---------------------------------------	----------	----------	----------

United States v. Ursua, Guadalupe

Motions for Dis- covery, Severance, Disclosure of Infor- mants, Bill of Particulars	09/22/86	11/10/86	11/13/86
---	----------	----------	----------

Government's Motion for Severance	11/12/86		11/13/86
---	----------	--	----------

United States v. Ursua, Thomas

Motions for Discovery, Severance, Disclosure of Informants, Bill of Particulars	09/22/86	11/10/86	11/13/86
Government's Severance	11/12/86		11/13/86

United States v. Wachter, Richard

Motions for Discovery, Severance, Disclosure of Informants, Bill of Particulars	09/22/86	11/10/86	11/13/86
Government's Severance	11/12/86		11/13/86

United States v. Walter, Wesley

Motions for Discovery, Disclosure of Informants, Grand Jury Transcripts, & Bill of Particulars	09/22/86	11/12/86	11/21/86
Motion to Dismiss	04/03/87		04/14/87
Motion for Reconsideration	04/30/87		05/04/87

United States v. Young, Roland

Motion to Dismiss	08/05/87		09/18/87
-------------------	----------	--	----------

United States v. Ybara, Bernardo

Motions for Discovery, Severance, Productions, Bill of Particulars	09/22/86	11/10/86	11/13/86
--	----------	----------	----------

Government's Severance	11/12/86		11/13/86
------------------------	----------	--	----------

Defense Motions	03/31/87		04/20/87
-----------------	----------	--	----------

(Trial commencing 07/14/87 and ending 08/13/87)

Motion to Dismiss	07/17/87		07/21/87
-------------------	----------	--	----------

Motion to Dismiss	08/05/87		08/06/87
-------------------	----------	--	----------

FILED

Dec 1 M '87
CLERK, U.S. DIST. COURT
EASTERN DIST. OF CALIF.
AT FRESNO

BY _____
DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,	)	CR F-86-89 EDP
)	
v.	)	ORDER
	)	DENYING MOTIONS
HENRY GARCIA, JR.,)	
WILLIAM HICKS, and)	
WESLEY WALTER,)	
)	
Defendants.)	
_____)	

Counsel for the defendant Garcia has filed a motion for discovery, for a bill of particulars, for the names of informants, for the disclosure of electronic surveillance and for a statement of defendants.

Counsel for the defendant Hicks renewed all of his prior motions that had been denied.

The Court established the deadline for filing motions in this case as being March 20, 1987. Many of these motions were made prior to that time by other defendants.

The Court denies the motions as being untimely.

DATED: November 30, 1987

EDWARD DEAN PRICE
United States District Judge



Title 18 United States Code § 3161

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon the motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense of an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date

the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal of a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to —

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including

any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing defendant to demonstrate his good conduct.

(3) (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the fact that the defendant

pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8) (A) Any period resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

- (i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.
- (ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.
- (iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.
- (iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would

deny counsel for the defendant or the attorney for the Government reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j) (1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly —

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest legality of his delivery).

(k) (1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs

more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

